Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1349

LINDA K. SABATER,

Petitioner

vs.

STATE OF KANSAS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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NATURE OF THE ACTION

The petitioner, Linda K. Sabater, was convicted by a jury on July 13, 1978, in the District Court of Sedgwick County, Kansas, of possession of cocaine, a felony. The Court of Appeals of the State of Kansas affirmed petitioner's conviction in State v. Sabater, 3 Kan. App.2d 692, 601 P.2d 11 (1979), (Appendix A2 of Petition for Writ of Certiorari) and denied petitioner's motion for rehearing on October 25, 1979. On December 6, 1979, the Supreme Court of the State of Kansas denied petitioner's request to review the opinion of the Court of Appeals of Kansas. Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1257, § 3; in support thereof, petitioner erroneously contends that the judgment of the Court

of Appeals of Kansas is in conflict with decisions of this Court.

QUESTIONS PRESENTED FOR REVIEW

Whether the search of defendant's purse, incident to a lawful arrest executed with a valid warrant, constituted a violation of petitioner's protection from unreasonable search and seizure under the Fourth Amendment of the United States Constitution.

Whether the Kansas Statute, classifying cocaine as a narcotic and prohibiting the possession of such drug, is violative of petitioner's constitutional rights of due process, equal protection, privacy and freedom from cruel and unusual punishment, under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.

Whether the judgment of the Court of Appeals of Kansas, denied review by the Supreme Court of Kansas, finding the search of petitioner's purse proper under the circumstances, is consistent with the decisions of this Court.

ARGUMENTS AND AUTHORITIES

I. CERTIORARI SHOULD BE DENIED BECAUSE THE SEARCH OF PETITIONER'S PURSE, INCIDENT TO A LAWFUL ARREST, (1) WAS REASONABLE AND, THUS, NOT VIOLATIVE OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION; (2) THE QUESTION PRESENTED BY PETITIONER DOES NOT INVOLVE A NOVEL, IMPORTANT, OR UNRESOLVED FEDERAL QUESTION; AND (3) THE FEDERAL CIRCUIT COURTS ARE NOT IN CONFLICT REGARDING THE CONSTITUTIONALITY OF THE TYPE OF SEARCH WHICH OCCURRED IN THE INSTANT CASE.

Petitioner contends that the search of her purse, was conducted in the absence of exigent circumstances, subsequent to the time she was placed in custody; and after the police had reduced her purse and wallet to their exclusive possession. Under these circumstances, she maintains that the search was unreasonable and violative of the Fourth Amendment of the United States Constitution, citing to State v. Chadwick, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979) as controlling.

Both Chadwick and Sanders are distinguishable from the instant case. It is not disputed that petitioner's arrest was lawful. What is questioned is the legality of the search of petitioner's purse.

Law enforcement officials arrested the petitioner in the lobby of her

employer's premises. The petitioner was allowed to return to her desk, accompanied by her supervisor, to retrieve personal belongings. Upon her return, an arresting officer took petitioner's pocketbook. The purse was not secured by any snaps, locks, zippers or other devices. Among the contents of her purse was a wallet in which the arresting officer found a straw, later determined to contain cocaine (State Record).

At trial, petitioner's motion to suppress the incriminating straw was denied.

Contrary to petitioner's position, the search in this instance was lawful. In Arkansas v. Sanders, supra, this Court said:

> Although the general principles applicable to claims of Fourth Amendment violations are well settled, litigation over a request for suppression of highly relevant

> evidence continues to occupy much of the attention of Courts at all levels of the State and Federal Judiciary. Courts and law enforcement officials often find it difficult to discern the proper application of these principles to individual cases, because the circumstances giving rise to suppression requests can vary almost infinitely. Moreover, an apparently small difference in the factual situation frequently is viewed as a controlling difference in determining Fourth Amendment Rights. At _____.

In Sanders, the Court noted that interpretation of the Fourth Amendment has included "the requirement that normally searches of private property be performed pursuant to a search warrant issued in compliance with the warrant clause". [Citations omitted]. In the ordinary case, therefore, a search of private property must be both reasonable and performed pursuant to a properly issued search warrant. At_____. Also in Sanders, this Court, noting there are

exceptions to the warrant requirement; offered this insightful comment:

> These have been established where it was concluded that the public interest requires some flexibility in the application of the general rule that a valid warrant is a pre-requisite for a search. At_____.

A particularly instructive case in distinguishing Chadwick and Sanders from the instant case is United States v. Garcia, 605 F.2d 349, 352 (7th Cir. 1979). In Garcia, the Court after acknowledging the fundamental right guaranteed by the Fourth Amendment to be secure against unwarranted invasions by the State, noted:

> [It] is well - settled that a warrantless search conducted incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. At _____ .

Citing to United States v. Robinson, 414 U.S. 218 (1973). Further, "[s]uch

searches have been held to be reasonable within the same meaning of the Fourth Amendment when effected for the purpose of disarming the arrestee or to preserve evidence probative of criminal conduct". At 352-3. Garcia further stated that warrantless searches pursuant to a valid arrest, if substantially contemporaneous with the arrest and confined to the person and the immediate vicinity of the arrestee, have been held to be lawful.

In Chimel v. California, 395 U.S. 752 (1969) this Court addressed the scope of such searches:

> [I]t is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction .... There is ample justification, therefore, for a search of the arrestee's person in the area "within his immediate control" -- construing that phrase to mean the area from which he might gain pos-

session of a weapon or destructible evidence.

In the instant case, the search was conducted within a few minutes following petitioner's arrest and immediately after she returned from fetching her purse. Therefore, the search was substantially contemporaneous with the arrest. The search was also spatially limited to the person of the arrestee, and to a possession immediately associated with petitioner's person.

The Court in Garcia, also noted that in Chadwick:

> [T]he object seized was a cumbersome, 200 pound double-locked footlocker, which obviously could be neither quickly opened nor rapidly removed by the defendant or an accomplice at the time of arrest. It is also significant that the search itself was not undertaken in close proximity to the time and place of the arrest and seizure. Rather, the footlocker was opened more than one hour following the arrest, and then only after it had been removed along with the defen-

> dants to the police station... Under these circumstances, ample justification existed to delay the search until a warrant could be obtained. At 353.

The facts of the present case are very similar to those in Garcia. Here, the object searched was a hand-carried purse. In Garcia, the object of search was hand-carried luggage. In both situations, the defendant could easily gain access to a weapon or evidence. Neither search was remote in time or place from the arrest.

Addressing petitioner's second point regarding the reduction of the items searched to the exclusive control of law enforcement officers, a return to Garcia is appropriate. In Garcia the defendant had maintained that luggage seized, and reduced to the exclusive control of the police, could not lawfully be searched because there were no exigent circum-

stances at the time of the search. The Chadwick rationale, referred to above, in Garcia is not applicable here. As the Garcia Court points out.

> [To] construe the term "exclusive control" as meaning it attaches immediately upon the seizure of an object located on the person or within the immediate vicinity of the arrestee, is a construction incapable of application consistent with fundamental principles of constitutional law. Under such a construction, for example, the warrantless search of an arrestee resulting in the seizure of a wallet, purse, or shoulder bag would prohibit an immediate search of the contents of that type of container, and this is plainly contrary to the law governing searches incident to arrest. Rather, the concept of "exclusive control" must be construed in the context of its application in Chadwick where the Supreme Court stated:
>
> Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore, cannot be viewed as incidental to the arrest or as justified by any other exigency. 433 U.S. at 15. [Emphasis added].

In the instant case, where the purse searched occurred within minutes of petitioner's arrest and in the immediate presence of the arrestee, there is a distinct difference. Chadwick is simply not applicable.

Petitioner cites Sanders as controlling because this Court there found that law enforcement officers, who had seized luggage and had it exclusively within their control at the time of the search, should have obtained a search warrant. Sanders, however, is distinguishable because it involved a closed suitcase in the trunk of an automobile. This Court, under the circumstances of Sanders, was cognizant that there was no danger the contents of the piece of luggage could have been removed, prior to the issuance of a valid search warrant.

Should there still be some question

as to the validity of the purse search, the State invites this Court's attention to the Seventh Circuit Court of Appeals language in United States v. Berry, 560 F.2d 861 (7th Cir. 1977). In Berry, the Court held that an attache case did not fall within the category of personal property immediately associated with the person of the arrestee. Further the Court made a comparison:... "a purse... might be characterized as 'immediately associated with the person of the arrestee' because it is carried with the person at all times, the attache case was here more like luggage..." At 864.

Following a discussion of Chadwick, the Court in Berry further amplified the distinction between items immediately associated with the arrestee and items within the immediate control of the arrestee:

> The Court appears to be distinguishing - for purposes of whether a warrant is required to search property in police custody that was seized from a suspect at the time of arrest - between searches of an arrestee's clothing as in Edwards or items that were in the pockets, as in Robinson from searches of other possessions, such as luggage, that were within his immediate control. Warrantless searches of the former items after they come in police custody can be characterized as searches of the arrestee's person, because they do not involve any greater reduction in the arrestee's expectations of privacy than that caused by the arrest itself. Warrantless searches of the latter items, however, affect privacy interests other than those reduced by the arrest itself and thus can be conducted only so long as the danger exists that the arrestee might gain access to the property to seize a weapon or destroy evidence.

In the instant case a purse clearly falls within the category of personal property immediately associated with the person of an arrestee. Therefore, it is subject to a search incident to a lawful

arrest without the requirement of a warrant. A purse is almost universal in use as a necessary part of a woman's wardrobe, the type of personal property commonly carried with the owner. This item is generally not locked and not associated with items such as briefcases, attache cases, or luggage. No greater reduction in the expectation of privacy occurs by the search of a purse than there would be in a search of a man's billfold, carried in his pocket at the time of arrest.

Petitioner seeks to make a purse analagous to luggage in that a purse is also a "repository of personal possessions". This similarity of use is only one factor mentioned in Sanders. The foregoing discussion has adequately demonstrated the reasons Sanders is not controlling here.

Should this Court find that the search in this case does violate the rule enunciated in Chadwick, Chadwick is nevertheless inapplicable to the instant case. The search of petitioner's purse occurred on June 10, 1977, and this Court decided Chadwick on June 21, 1977. Chadwick is not to be applied retroactively. United States v. Stewart, 591 F.2d 63 (9th Cir. 1979); United States v. Cornejo, 598 F.2d 554 (9th Cir. 1979); United States v. Berry, 571 F.2d 2 (7th Cir. 1978), cert. denied, 439 U.S. 848 (1978).

From the foregoing discussion, it is clear that petitioner's request for a Writ of Certorari is not one based on a novel situation or a circumstance not formerly addressed by this Court.

Further, a diligent search has failed to uncover any conflict between

the Circuit Court of Appeals in rulings governing circumstances similar or substantially similar to those of the instant case.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE KANSAS STATUTE, CLASSIFYING COCAINE AS A NARCOTIC AND PROHIBITING THE POSSESSION OF SUCH DRUG, DOES NOT VIOLATE CONSTITUTIONAL RIGHTS OF DUE PROCESS, EQUAL PROTECTION, PRIVACY AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Petitioner contends that K.S.A. 65-4127(a) (Appendix A12 of Petition for Writ of Certorari) violates the due process and equal protection rights guaranteed to her by the United States Constitution. She asserts that cocaine

is improperly classified as a narcotic drug and that the Kansas Statute prohibiting possession of cocaine is unconstitutional. She also asserts there is no scientific evidence to justify such classification.

Respondent invites this Court's attention to language contained in United States v. Hobbs, 392 F. Supp. 444 (1975):

> In classifying cocaine as a narcotic drug, 21 U.S.C. § 802(16), Congress was not required to accept the pharmacological definition of a narcotic. Thus, the numerous affidavits submitted by defendant's experts are of limited relevance since they tend to establish only that cocaine is not a narcotic in pharmacological classifications. The sole question presented is whether there is some rational basis for the statutory classification of cocaine as a narcotic. In United States v. Brookins, the Court pointed out that there was some evidence that Congress was aware of the discrepancy between the legal and pharmacological classifications of cocaine at the time of hearings immediately preceeding the

1970 Act, but retained the "narcotic" classification of cocaine for control and penalty purposes because of "its established capacity as a dangerous drug, (and) its long association with heroin in the illicit market.

383 F. Supp. at 1216.

There are any number of rational bases which can be assumed under the Carolene test in upholding the congressional classification of cocaine as a narcotic for penalty purposes. Congress may have concluded that since the price of cocaine on the illicit drug market is extremely high, it is more likely to attract major drug traffickers or provide a source of revenue for organized crime. Congress may have concluded that a high-profit enterprise must also be treated as a high-risk enterprise in order to effectively deter criminal activity in this market. Congress may have retained the "narcotics" classification because of the paucity of scientific data concerning the use and effect of cocaine, or because it is used by drug abusers either alone or in combination with heroin, or in furtherance of treaty obligations. See 21 U.S.C. § 801(7). These considerations, either singly or in combination, provide an ample foundation for finding that the congressional classification of cocaine as a narcotic has a rational basis....

To the extent that the defendants have argued for reclassification of cocaine on the basis of newly discovered scientific evidence, their argument has been presented to the wrong branch of Government. Congress has the power to reclassify cocaine. Congress has delegated that power to the Attorney General, 21 U.S.C. § 811(a)(1). The existence of an established reclassification mechanism underscores the impropriety of this Court taking such action. See United States v. Foss, 501 F.2d 522, 530 (1st Cir. 1974).

Since there is a rational basis for the classification of cocaine as a narcotic for control and penalty purposes, the Court holds that this classification does not violate the defendant's Fifth Amendment rights. Accordingly, the motion to dismiss is hereby denied.

Federal Courts have consistently determined that a rational basis exists for classification of cocaine as a narcotic drug for penalty purposes. See United States v. Harper, 530 F.2d 828 (9th. Cir. 1976) cert. denied 429 U.S. 80, 97 S. Ct. 66; United States v.

Lindelow, 435 F. Supp. 367 (District of Puerto Rico 1977); United States v. Smaldone, 484 F. 2d 311 (10th Cir. 1973) cert. denied 415 U.S. 915.

Petitioner also alleges that the classification of cocaine as a narcotic for penalty purposes violates the Eighth Amendment prohibition against cruel and unusual punishment. Petitioner notes that the penalty for possession is greater than if she were convicted of sale of marijuana.

In United States v. Castro, 401 F. Supp. 120 (Northern District of Illinois 1975), the Court considered the related situation of classification of marijuana (also the subject of scientific evidence supporting unreasonable classification arguments), in the federal schedule I along with heroin; the Court stated at 127:

> Nor do we find that the disparity in penalties offends the Eighth Amendment as the statute "does not exist an inclination to visit upon the offenders penalty so out of proportion to the crime committed that it shocks a balanced sense of justice". In citing Helperin v. United States, 295 F.2d 458 (9th Court of Appeals 1961).

CONCLUSION

It is respectfully submitted that inasmuch as the decision of the Court of Appeals of Kansas affirming petitioner's conviction has been shown to be consistent with decisions of this honorable Court and the Federal Circuit Courts of Appeal, the petitioner should be denied a Writ of Certiorari.

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IN THE SUPREME COURT FOR THE UNITED STATES

LINDA K. SABATER, Petitioner, vs. STATE OF KANSAS, Respondent.	Case No. 79-1349 CERTIFICATE OF SERVICE

This is to certify that a copy of the Brief in Opposition was mailed, first class postage prepaid, to James S. Phillips, Sr., 3241 East Douglas, Wichita, Kansas 67218, and a copy was hand carried to Tom Haney, Assistant Attorney General, Office of the Attorney General, Kansas Judicial Center, 301 West 10th, Topeka, Kansas 66612, on the 31st day of March, 1978.

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